

Applicant No. _____
Arkansas Bar Examination
February 2007

2 pages
Criminal Law & Procedure

Rodney, at twenty years old, lay alone on a park bench in Riverview Park almost completely covered with snow. He had on a ripped jacket with a bag of crumbled potato chips hanging out of his left jacket pocket and he was holding a soda. It was so cold that his left hand was frozen to the soda and his right hand and feet were numb. He had been in and out of correctional facilities since he was thirteen years old.

Rodney had not planned on spending the coldest night of the year outside. Earlier that day he spent all he had on drugs. He had planned on staying at Eddie Mae's, a local homeless shelter. On his way to Eddie Mae's, he had stopped by Lannie's Convenience Store to pick up a few items. He had every intention of paying for the items when he entered the store. As soon as he walked in the store, Eric, the manager, began to watch him.

Rodney got a soda and started to walk towards the front of the store where a stand containing potato chips was located. The potato chip company was giving away a \$10,000.00 grand prize. As Rodney approached the stand, he saw Karen outside about to leave after getting gas. He could scam enough money from her to get high and have a place to sleep. Rodney picked up a bag of chips containing the grand prize golden chip worth \$10,000.00. He put the bag of chips in his coat pocket and with the soda in his left hand, he pushed the door open with his right hand. As he yelled for Karen, Eric grabbed him by his jacket. The jacket ripped. Rodney was half-way out of the door. Rodney turned around and instinctively swung at whoever it was that was grabbing him from behind. Eric was hit in the head, fell backwards and broke his neck. He died instantly. Rodney's next instinct was to run.

Rodney ended up at Riverview Park where he fell asleep. The next morning he was awakened by Officer Gilbert. Officer Gilbert was a local police officer that spent his time off volunteering for Eddie Mae's Shelter and was out looking for people because it was too cold to survive outside. While he was volunteering, Officer Gilbert never wore his uniform. He would carry his service revolver because he was authorized to carry it by the Chief of Police at all times.

When he got Rodney in the Shelter's van, Officer Gilbert noticed that his left hand had a soda frozen in it. He remembered hearing over the police scanner that a store clerk had been killed by a blow to the head that had appeared to come from a soda can. It didn't mean anything to him at that moment because he was more concerned with how he was going to get the soda out of Rodney's hand. He asked Rodney what he was doing outside in the cold. Rodney mumbled something to him that he couldn't understand. Officer Gilbert then asked him what he had done the night before. Rodney blurted out, "I'm a thief, I'm not a killer. I never hurt anybody." Officer Gilbert immediately brought the van to a halt. He turned to Rodney and asked him to repeat what he just said. Rodney refused. He knew he had gone too far. Rodney tried to get out of the van, but Officer Gilbert hit the automatic lock and began to drive towards the police station. Rodney begged Officer Gilbert to stop and let him out. Officer Gilbert responded that he would let him out if he would repeat what he said. Rodney knew he couldn't make it very far with a soda frozen in one hand and frostbite in the other hand and feet. So, he said, "I'm a thief, I'm not a killer. I never hurt anybody. But, he grabbed me. I was trying to get something off of Karen." Officer Gilbert immediately read Rodney his Miranda rights and took him to the police station.

Rodney was taken to the interrogation room where Detective Claudia planned to interrogate him. He was read his Miranda rights again. Rodney would not say anything. Detective Claudia lied to Rodney and told him that Lannie's Convenience Store had a camera that showed everything. In fact, the store's camera was broken. She also told him that she had talked to Karen and had gotten her to agree to drop all charges against him. This was also a lie, as she had not talked with Karen. Fearing he would go to jail for a long time, Rodney asked Detective Claudia to tell him what she wanted to hear. Detective Claudia replied, "Everything!" Rodney then told Detective Claudia that he had gone into the store to buy a soda and chips. He saw Karen and was going to get some money from her. He told Detective Claudia that when he was grabbed from behind, he instinctively hit the person that was grabbing him. The person fell backwards. When he turned to see who had hit him, he saw Eric on the floor with his head twisted in an awkward position. He then ran. Rodney asked if he could leave. Detective Claudia told him that she needed to make a phone call and would be back.

You are called by Detective Claudia and asked for assistance in completing the affidavit for Rodney's arrest. What advice will you give Detective Claudia about all of the criminal charges with which Rodney may be charged? She isn't interested in pursuing any charges that deal with criminal attempt or any habitual offender allegation. She is also not interested in pursuing any misdemeanor charges against Rodney or any charges for negligent homicide or manslaughter.

Assume that you are appointed to represent Rodney, what motions, if any, would you file in the event charges are filed against him? Discuss how the Court will rule on any of your motions.

CRIMINAL LAW – BEST ANSWER
FEBRUARY 2007

- (1) What advice would you give to Detective Claudia about all of the criminal charges with which Rodney may be charged?

Every element of these charges must be proved beyond a reasonable doubt:

Aggravated Robbery: Robbery is the intentional taking of personal property, through the use of force or threat, with the intent to permanently deprive another. Rodney went into the store, took chips and a soda (personal property), with the intent to permanently deprive the store of these goods. I would charge him with this because even though he might not have had the original mindset to use force, he struck Eric so he could get out of the store with the stolen goods. Also, because of the injuries and the use of force Rodney used, I would pursue aggravated robbery instead of robbery. Arkansas allows for robbery in the first, second and third degree and aggravated robbery. I think aggravated robbery will be appropriate in the situation. Only, even though the total of the items stole was probably less than \$1.00, he stole the bag of chips that were worth \$10,000 which would justify this charge.

Theft: Arkansas has merged all the common law crimes of Larceny, Embezzlement and False pretenses into one to create Theft. Theft has varying degrees in Arkansas depending on the nature of the crime. Theft is the initial taking/obtaining of personal property with the intent to deprive. If we can sustain an Aggravated Robbery charge then we can drop this charge, but it is also an alternative. Also, the amount stolen should still be listed as \$10,000 because that was the value of the merchandise Rodney stole.

Murder: Murder in Arkansas has five degrees: (1) Capital Murder; (2) Murder in the first degree; (3) Murder in the second degree; (4) Manslaughter; and, (5) Negligent Homicide.

I feel that we could charge Rodney with capital murder. This would be killing of someone in the commission of a dangerous felony with extreme indifference to the value of human life. Robbery is considered a dangerous felony and he killed Eric while he was in the commission that crime. Also, when he hit Eric with a full soda, he had an extreme indifference to the value of Eric's life.

Murder in the first degree is when someone kills someone in the commission of a felony (not necessarily dangerous) with the extreme indifference to the value of human life. He, as stated above, was in the commission of a felony robbery or theft and hit Eric so hard that his actions can be considered extremely indifferent to the value of human life. This might be a more realistic alternative for you to pursue. Also, if you could show he purposefully killed Eric it would fall under this charge. That would be that it was Rodney's conscious object was to kill Eric. This would probably be hard to prove though because the evidence doesn't seem to suggest that.

Murder in the second degree might be a reasonable alternative. This charge will also cover "knowingly" killing someone. Knowingly would be if Rodney was aware that his actions were of a particular type of conduct that could achieve this particular result (killing). This will also cover a reckless killing in the commission of a felony. Negligence will be imputed if he consciously disregarded a substantial and unjustifiable risk. Hitting someone upside the head with a full soda would be consciously disregarding a substantial risk.

Battery: Felony battery could also be charged against Rodney. Arkansas has varying degrees of battery, looking at what type of weapon was used, the degree of harm and other various factors. Rodney hitting Eric upside the head would constitute battery; an unlawful application of force that results in harmful or offensive contact.

Leaving the Scene of an Accident: This could also be considered since Rodney fled the scene after he had killed Eric.

(2) Motions to file on behalf of Rodney:

Motion to Suppress Any Statement Made in the Van:

Officer Gilbert, even though in plain clothes, interrogated my client, Rodney, without his Miranda Warnings. Officer Gilbert, as soon as he saw the soda can and remembered the police scanner message, was acting as in his scope as a police officer (governmental agent). Therefore, when he was asking Rodney questions about what he had been doing that night he was interrogating him. Interrogation is defined as any statement likely to elicit an incriminating response. Also, Rodney was in a moving van and did not feel free to leave. Custody is when a person, looking at all the circumstances would not feel free to leave. Since there was interrogation and custody, my client should have been given his constitutional Miranda warnings of "You have the right to remain silent, anything you say can and will be used against you in a court of law, you are entitled to an attorney and if you are not able to afford an attorney one will be provided for you". Rodney, in this custodial interrogation, did say that "I'm a thief, I'm not a killer. I never hurt anybody". If he would have been given his Miranda warning prior this could be looked at as a voluntary confession, but since he was not given his warnings this must be excluded. After this, Rodney tried to leave but was locked in the van against his will and told that he would not be let out until he repeated what he had said. Rodney was scared and being held against his will. His statement was under complete duress and was clearly involuntary. Finally, after all this, he was read his Miranda warnings, but that can not retroactively go back and make his former statements admissible.

The court will probably rule that Officer Gilbert was acting as a civilian until he heard the incriminating response, therefore the first statement would be held admissible. However, after he locked Rodney in the van and made him repeat what he said, this will probably be a violation of his rights and will be suppressed. This will be a judge determination.

Motion to Suppress Statements Made in the Interrogation Room:

Rodney was given his Miranda warnings by this time, but he was lied too about the camera and was lied to when told that Karen would drop all the charges. Also, any statement was not voluntary because he stated "tell him what you wanted to hear" and the detective replied "Everything!" By this point, he was still cold, he had been locked in a van by a police officer and forced to give statements before he was read his "rights".

The motion will probably be unsuccessful. He was given his Miranda warnings twice and still re-told the story about what had happened. However, if the original motion was granted this could still be a tainted statement and also suppressed.

Motion to Suppress Any Evidence Obtained:

The soda can should be excluded from evidence. There was no probable cause to believe that it was a weapon used in a crime. Rodney was not aware that the Officer was working in his capacity as a government agent and would not have been able to see the can or get the can if he would not have been acting as a police officer. The evidence is fruit of the poisonous tree due to an unlawful search of the Defendant and would not have been discoverable through inevitable discovery, independent source, or intervening free will.

This argument will probably fail. The can was in plain view. Rodney did not try to conceal it and will probably be admissible evidence.

Motion for Affirmative Defenses:

I will argue that if my client did these things it was because of necessity, self-defense and insanity. Rodney was 20 years old, it was freezing, and he had to have food to survive. This food and drink was a necessity for his survival that night. I will also argue that when Eric grabbed him from behind, Rodney was acting in self-defense when he hit Eric. Rodney is a kid that has grown up on the streets all his life and if someone grabs you on the street you must fight back. He did not use unreasonable force to fend off Eric. He was grabbed by Eric and he hit Eric once to fend the attack. It was a reasonable use of force by Rodney. I will plead Rodney is not guilty because of mental disease or defect. Rodney was homeless, he lived on the streets and following the McNaughton test followed in Arkansas, Rodney was not able to appreciate the criminality of his actions or conform his actions to the requisites of the law.

The necessities and insanity will probably fail. The self-defense could possibly prevail, but the evidence that he was walking out the door with stolen merchandise would give Eric a legitimate reason for grabbing Rodney and would not warrant being hit on the head with a soda can.

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TORTS

Mary Ellen Shockwave looked forward to lunch with her daughter, Mary Elizabeth, at George's...a new sidewalk café in their hometown. Mary Ellen was anxious to arrive early to greet her daughter, but drove leisurely down the mountain to keep watch for deer crossing the roadway. Mary Ellen was confident she would be able to persuade Mary Elizabeth to move back to the village of Nowhere, the family's hometown.

Entering Nowhere, on Village Road, Mary Ellen's right front tire struck a large pothole sending the wheel cover on her recently purchased Suvmobile off of the roadway and down into a drainage ditch running parallel to Village Road. Mary Ellen carefully pulled onto the shoulder of the road and began a search for the wheel cover. She moved slowly back and forth down the steep drop-off. Mary Ellen quickly located the part, turned, and began the climb to return to her car. Struggling to keep her balance she wondered why the super special locking wheel cover dislodged. How was it possible?

Catherine Lyn Rich and Betty Jo Sueus, neighbors of Mary Ellen, had also planned for weeks to dine at George's today, August 3, 2003, which was the grand opening. Anticipating a large lunchtime crowd, they knew they should leave early for the trip to Nowhere, but their departure was delayed for thirty minutes. Catherine Lyn quickly descended the mountain and, as she pulled through the last of several sharp "S" curves, saw Mary Ellen's Suvmobile parked on the side of the roadway. Suddenly, the right front tire of her pickup truck fell into the same pothole that plagued Mary Ellen. Instantaneously, the old-fashioned chrome metal hubcap on Catherine Lyn's restored red 1952 Chevrolet pickup truck detached from the wheel and sailed through the air towards its unintended target...Mary Ellen's head.

Mary Ellen awoke from a coma in Nowhere Local Hospital a full month after the Chevy truck's hubcap struck her between the eyes, leaving her with a debilitating brain injury. Mary Elizabeth, a nationally recognized personal injury trial lawyer, was determined to make certain that her mother's future would be financially secure.

Mary Elizabeth must now decide whether suit should be filed and, if so, against whom should the claims be made. Assume that the law of Arkansas applies to this controversy. List the potential defendants and then discuss the nature of the potential claims that Mary Elizabeth might pursue.

Next, discuss the potential defenses that each defendant should raise in response to the claims made against each.

Finally, describe your evaluation of the probable success or failure of the potential claims and defenses of the parties.

TORTS – BEST ANSWER

FEBRUARY 2007

Mary Elizabeth – ME (lawyer)
Mary Ellen Shockwave – MES

MES v. Catherine Lynn Rich (CLR)

MES probably has a negligence claim against CLR. The elements of a negligence action are:

- 1) an existing duty owed to MES
- 2) breach of such duty
- 3) causation
- 4) damages

In this case, the damages are clear in the brain injury and require no further discussion.

Any individual owes all other persons a duty to act as an ordinary prudent person under similar or the same circumstances. In this case, CLR owed MES a duty to drive with reasonable care down a curvy mountain.

CLR arguably breached such duty by driving down the mountain quickly. While speed limit may not entirely determine the result, it would be a critical factor. However, even an individual driving slowly and with caution did not avoid the pothole (MES); therefore, speed may not be quite as important. But if it is determined that CLR was exceeding the speed limit, that may be a sufficient breach.

Causation is a significant issue as well in this case. In order to be liable, CLR must have proximately caused the injury. This can essentially result from CLR's action if the injury was foreseeable in driving too fast down the mountain. While such injury was unlikely, it was foreseeable that someone may have been injured if CLR was not driving reasonably.

MES v. Auto Manufacturer 1 and Retailer/Wholesaler

MES probably has a products liability claim against the manufacturer. MES must show that she received the car from the merchant seller and that it was in an unreasonably dangerous condition or defective by either design or manufacture (mfr). MES would also have to show that it moved in the ordinary channels of distribution from the mfr and that it was in their exclusive control. This would result in strict liability for the mfr.

The subsequent wholesalers/retailers could only be sued in negligence. MES would have to show that the wheel cover was damaged by them.

MES would have similar claims against the mfr and wholesaler/retailer of CLR's car since Arkansas is a comparative fault jurisdiction which takes every party's actions into account.

CLR may have a claim against such parties as well as for property damage.

MES v. Nowhere

MES may have a claim against the municipality if she can argue that the pothole had caused prior accidents of which Nowhere was on Notice and declined to repair it. However, municipalities are subject to qualified immunity which basically would require MES to prove that Nowhere acted *intentionally*. In Arkansas, gross negligence would not suffice.

Defenses

CLR would first argue that MES assumed the risk of her injury or was at least comparatively negligent in climbing such a steep mountain without putting up some indication of warning for those coming around steep curves. CLR could also argue that she did not cause the accident and that her mfr. or retailers tortious conduct was an intervening cause that was not foreseeable.

CLR may have a statute of limitations defense if MES did not bring the claim within 3 years.

The mfr. may argue that CLR was not using the automobile in a foreseeable way since it was a 1952 Chevy which should be handled with extreme caution (out of date or beyond its life). They could also argue that the product was just not defective. MES's mfr. would have to assert such argument.

Probable Success

CLR would probably be found liable for negligence given her lack of due care driving down the mountain. Moreover, MES's mfr. would probably be found comparatively negligent. Chevy would probably be free from liability.

Arkansas has abolished joint and several liability for personal injury claims; thus, each defendant's conduct will be considered and apportioned. If MES was 50 % or more at fault, she cannot recover.

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EQUITY & DOMESTIC RELATIONS

1. Wife and Husband have been married for 20 years. Husband has been employed by the same employer for almost 19 years, and his pension vests after 20 years of continuous service. The parties will be divorced next month by decree of an Arkansas Circuit Court. What are Wife's chances to obtain a portion of Husband's pension; and, what portion, if any, will she likely receive?

2. Husband purchased a house in his sole name a week before the parties married. The purchase was one hundred percent financed on a 30-year note. The parties will be divorced 31 years later. The Husband paid off the house note entirely from his earnings during the marriage. Is Wife likely to receive any interest in the house as marital property? If not, explain why not. If so, explain why and tell how her interest will be calculated.

3. Explain the basic differences between actions for separate maintenance and absolute divorce.

4. When a divorced spouse (divorced and living in Arkansas) seeks to move to another state with his minor children, (from the marriage), what factors should the judge consider (in a contested proceeding with the ex-spouse) when deciding whether to permit him to move out of state with the children? What presumptions, if any, apply in the decision-making process for the trial judge?

5. Husband and Wife have been married 10 years. Husband has been an unemployed house-husband during the marriage. Wife is a well-paid physician who is having an affair with McDoozy who also works at the hospital. Husband wants a divorce and alimony. Do Arkansas courts award alimony? What are the appropriate considerations for the judge to consider in awarding alimony? Is adultery one of those considerations? If so, explain why?

6. Wife and Husband have been engaged in a hard-fought divorce action for over 12 months which has already resulted in two contested hearings over various issues regarding support and discovery. Wife has started a romantic relationship with another man. While in Florida last week on vacation, Husband won a million-dollar-a-year payout for the next five years. Is Wife likely to receive any interest in Husband's good fortune in the lottery?

7. Provide a short explanation of the following terms or maxims:

- (a) laches;
- (b) equity acts in personam; and,
- (c) equitable estoppel.

EQUITY & DOMESTIC RELATIONS – BEST ANSWER
FEBRUARY 2007

1. The issue presented is whether or not pensions are considered marital property in Arkansas. In Arkansas, vested pensions are considered marital property. According to the Arkansas courts, a pension is vested when the person whose name the pension is maintained has all rights to receive the benefits of the pension. In other words, a pension is fully vested when all the requirements to receive the pension have been met. However, under Arkansas law, unvested pensions are not marital property because the person in whose name the pension is maintained does not have a right to the property. The rationale behind this rule is that until the “pensioner” has met all requirements in order to receive the pension, the pension is nothing more than an expectancy interest. As such, a spouse upon divorce does not have a right to receive payment from an unvested interest.

Here, it does not appear that Wife will be able to receive any portion of the husband’s pension because it is not yet fully vested. The facts state that the couple are to be divorced next month but that the Husband is only on year 19 of a 20 year vesting plan. As such, unless the culmination of the 20th year occurs before the final divorce decree is entered, the Wife would not have any interest in the pension because at this moment the husband only has an expectancy interest in the pension. The Wife obtaining an interest in the pension at the time of divorce is important because if the Wife is unable to obtain an interest prior to divorce, then upon divorce the marital property determination made by the court will be considered final and unmodifiable.

Therefore, it appears that because the pension is not fully vested that wife will not receive any of the property. However, if the pension had vested then under Arkansas law the wife would be entitled to ½ of the pension payments.

2. The issue presented is whether or not a spouse is entitled to an interest in property purchased prior to the marriage upon divorce. In Arkansas, upon divorce, the court will divide the marital property equitably between the parties. However, separate property is not to be divided and is to be returned to the spouse in full. Separate property is defined as property that a spouse owned prior to marriage; received by gift or devise during marriage; or the income or appreciation in value of separate property during marriage. It should be noted, however, that a court may divide separate property if it is determined that there has been a co-mingling of funds or that marital property was used to pay for the separate property acquired before the marriage.

Here, it appears that the husband bought the property before the couple married. As such, the property would be deemed separate and not marital property. However, the income the husband received during the marriage would be considered marital property. As such, the husband using marital funds to pay for the home would in essence create a co-mingling of the separate property with the real property. Arkansas Courts have held where a husband brings separate property into the marriage and then uses marital funds to pay off the mortgage on that property, then the separate property becomes marital property. As such, the wife in this example would be entitled to her equitable share of the property, more than likely a ½ interest.

3. The action for separate maintenance occurs when the couple can no longer live together and the court determines that it needs to stabilize the relationship. The court may or may not determine property rights or may or may not determine support obligations, both alimony and child support. Unlike an absolute divorce, the parties to a separate maintenance action are still married, but just not living together. However, in an action for separate maintenance, the parties usually do not have grounds for divorce and in fact the parties may not want a divorce.

In contrast, an action for absolute divorce occurs when the parties do want to have a divorce, have grounds for divorce, and the court determines that a divorce should be granted. In an absolute divorce the court divides marital property, determines support obligations, alimony obligations, child support obligations, and visitation rights. An Action for divorce is deemed final, and the parties to the marriage will not be considered married after the final divorce decree is entered.

4. When deciding whether or not to permit a divorced spouse from relocating with a child out of state, several factors may be considered. First, the judge may consider whether the move is in the best interests of the child. Second, the judge may consider the reasons for relocation, including a new job opportunity. Third, a judge may consider the distance of the move and the remaining spouse's ability to maintain a lasting and loving relationship. Fourth, a judge may consider whether the remaining spouse will be able to visit the child. Fifth, the leisure, educational, and recreational activities in the new location need to be analyzed. Sixth, the child's access to extended family in the new location needs to be determined. Seventh, the judge may consider the desires of the child.

There is no presumption in Arkansas that relocation should not be allowed. In fact, the presumption is that if the relocating spouse is the custodial parent then the move will more than likely be presumed to be valid, or in the best interest of the child. It is up to the non-relocating spouse to bring forth evidence that the moving spouse is relocating with a bad intention or that the child will be harmed with the move.

5. Arkansas courts do award alimony. Alimony is awarded in order to rectify an imbalance of the earning power and standard of living of the spouses. Alimony is to be based upon a payor spouses ability to pay and receiving spouses need. However, in Arkansas alimony has been awarded less and less because in many marriages both spouses work, and also the increase in available marital property. However, in Arkansas, either spouse may be entitled to alimony and there is no need to show fault.

In awarding alimony, a judge is to generally consider the need of the petitioning spouse and the ability to pay of the payor spouse. The judge may also consider: 1. length of the marriage; 2. age, health and station in life of the spouses; 3. spouses financial obligation; 4. spouses financial circumstances; 5. amount of joint property; 6. spouses amount of income; 7. spouses amount of expendable income; 8. amount of marital property received in the divorce settlement; 9. assets of the spouses; 10. amount of separate property of spouses; 11. ability of the spouses to find employment; vocational skill; education.

Adultery is not one of the considerations a judge in Arkansas should use in considering whether or not to award alimony, because in Arkansas, marital fault is not to be one of the considerations.

6. Yes, Wife is likely to receive an interest in the Husband's winnings. In Arkansas, all marital property is divisible upon divorce. Marital property is defined as property acquired by the spouse during the marriage. Marital property includes property acquired up to the enter of the final divorce decree unless there has been a prior final determination of the property rights of others. The fact that a spouse has begun seeing another party is not sufficient to deny access to marital funds.

Here the husband won the money while the couple was still legally married. Also, there does not appear to be a final determination of the property rights of the marriage. Therefore, the winnings would be considered marital property. As such, the wife would be entitled to her equitable share of the property.

7. Laches is an equitable defense that can be asserted by a defendant against a plaintiff in a court of law. Under laches, a defendant will argue that plaintiff has delayed in bringing an action against the defendant and this delay has caused the defendant to be prejudiced. Laches can occur when a plaintiff fails to bring a cause of action resulting in the loss of material evidence or witnesses.

Equity as in personam. This is an equitable doctrine that demonstrates that courts issuing decisions in equity must have in personam jurisdiction over the person in order to enforce the decree. In equity, in order for a court to require or prohibit a person from doing something, the court must have in personam jurisdiction.

Equitable estoppel. Equitable estoppel is another equitable defense in which the defendant will allege that the plaintiff, through his actions, words, or omissions, mislead the defendant into action or believing something, defendant then relied upon these words, conduct, or omissions, but would not have relied upon them had he known the truth. As a result of this reliance, defendant suffered a detriment or injured plaintiff. A court will prevent a plaintiff from recovering from defendant or not allow an equitable remedy for the plaintiff if the court determines that the plaintiff should be estopped due to the plaintiff's conduct.

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PROPERTY

John and Jane Doe were married in 1970 and acquired Blackacre, a 1,000 acre farm, in their names which included fee simple title in the surface and all mineral rights. They had two children, Flo Doe and Ray Doe, each above legal age for the facts herein.

In 1993, John and Jane sold, by Quitclaim deed, $\frac{1}{2}$ of all the oil, gas, and other mineral rights to Big Oil. Jane died in 1995 and left a will that was properly probated. The will gave all her property to her two children, Flo and Ray. Flo was married at the time of her mother's death and Ray was a single person.

Flo, joined by her husband, sold to Ray, by Quitclaim deed, $\frac{1}{4}$ of Blackacre in 1996, including surface and mineral rights.

In 1999 Ray sold by general warranty deed, $\frac{1}{2}$ of Blackacre to Skinner, including $\frac{1}{2}$ of the mineral rights.

John Doe died in 2000, without ever remarrying. He had a will that left all his property to his two children, $\frac{1}{2}$ to Flo Doe and $\frac{1}{2}$ to Ray Doe. The will was probated.

- (A) What interest, if any, is owned by Flo Doe; why?
- (B) What interest, if any, is owned by Ray Doe; why?
- (C) What interest is owned by Big Oil; why?
- (D) What interest is owned by Skinner; why?

PROPERTY – BEST ANSWER

FEBRUARY 2007

In 1970 John and Jane Doe, husband and wife, acquired Blackacre in fee simple. In Arkansas, when a married couple acquires property during the marriage they take title as tenants by the entirety. This will prove to have several important implications in the present case. First, the tenancy by the entirety cannot be severed with a unilateral conveyance by one of the spouses. In order for the tenancy to be severed, both parties must join in the conveyance. Furthermore, upon the death of one of the spouses, the surviving spouse acquires the entire interest. Here, John and Jane Doe were married in 1970; in 1993 both parties sold $\frac{1}{2}$ mineral rights to Big Oil. Thus the conveyance is valid.

Next, Jane died in 1995. As previously stated, because John and Jane took title to Blackacre as tenants by the entirety, upon Jane's death her interest terminated and John became the owner to all of the surface of Blackacre and $\frac{1}{2}$ of the mineral rights. Thus, the will that was properly probated in 1995 giving the children, Flo and Ray, $\frac{1}{2}$ of Jane's interest will not affect John's rights to all of Blackacre and $\frac{1}{2}$ of the mineral rights.

At this point, Flo and her husband sell $\frac{1}{4}$ of Blackacre to Ray, by quitclaim deed. A quitclaim deed does not warrant title, in fact, it only conveys what interest the grantor has, if any, to the grantee. Here, because Flo has no interest in Blackacre to convey to Ray, there is no transfer. Next, in 1999 Ray sells by warranty deed, $\frac{1}{2}$ of Blackacre to Skinner, including $\frac{1}{2}$ the mineral rights. Again, Ray does not yet have interest in Blackacre so he may not convey an interest to Skinner. Ray did not take any interest from Flo because Flo had none to give. Furthermore, Ray did not take any interest from his mother's will because Blackacre was held by his parents as tenants by the entirety.

Now, here comes the tricky part. John Doe dies in 2000 leaving his property to his children, $\frac{1}{2}$ to Flo Doe and $\frac{1}{2}$ to Ray Doe. Luckily for Skinner, Ray gave him a warranty deed in the 1999 conveyance of Ray's purported interest in Blackacre. Because Ray did give a warranty deed, courts in Arkansas will apply the theory of Estoppel by Deed to this situation. Now that Ray is the proper owner of $\frac{1}{2}$ Blackacre and $\frac{1}{4}$ of the mineral rights, a court of equity will allow this interest to go to Skinner. Equity regards as done that which ought to be done. In this situation, when Ray attempted to convey his interest to Blackacre in 1999, had none to give. However, when Ray did receive interest under his father's will in 2000, that interest will go to Skinner and will relate back to the time of the original conveyance (ie: the 1999 transaction between Ray and Skinner).

It should be noted that Flo Doe's original conveyance to Ray Doe is not effective because she only gave Ray a quitclaim deed. The estoppel by deed doctrine will not apply to that situation and, as such, in 1996 when Flo attempted to convey her interest to her bother, it failed. Thus, the parties interests are as follows:

(A) Flo Doe's Interest

Flo Doe owns $\frac{1}{2}$ interest in the surface of Blackacre and $\frac{1}{4}$ interest in the mineral rights to Blackacre. Flo Doe is a married woman so all her interest in real property is subject to her husband's curtesy interest. This interest is subject to Big Oil's interest as the holder of mineral rights. Thus, there is an implied easement for big Oil to enter onto Blackacre and remove the minerals. Big Oil is liable to surface owner for unreasonable damage.

(B) Ray Doe's Interest

Ray Doe has no interest in Blackacre, surface or sub surface. Ray did not receive any interest from his sister's conveyance in 1996 for reasons previously stated and the interest he received from his father's will in 2000 went to Skinner under the theory of estoppel by deed.

(C) Big Oil's Interest

Big Oil took $\frac{1}{2}$ of the mineral interest in Blackacre in 1993. Both John and Jane joined in this transfer and, as such, it is valid.

(D) Skinner's Interest

Skinner has interest in $\frac{1}{2}$ of Blackacre and $\frac{1}{4}$ of the mineral rights. Skinner will not take $\frac{1}{2}$ of the mineral rights because Ray Doe did not at any time have interest to one half of the mineral rights to Blackacre. Ray only acquired $\frac{1}{4}$ from his fathers will. This interest is also subject to Big Oil's interest as the holder of mineral rights. Thus, there is an implied easement for Big Oil to enter onto Blackacre and remove the minerals. Big Oil is liable to surface owner for unreasonable damage.

APPLICANT NO. _____
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WILLS, ESTATES & TRUSTS

At age 80, suffering from dementia, **Blue** died on July 4, 2006. He had a close relationship with a woman for the last four years of his life, **Caregiver**, age 28, who lived with him and provided nursing care. **Blue** stated on numerous occasions that **Caregiver** would receive his entire estate.

At the time of **Blue's** death, no Will was found.

On September 1, 2006, **Do-right** was appointed administrator of **Blue's** estate, valued at \$1,000,000 cash. **Blue** did not own any real estate.

On January 15, 2007, **Caregiver** offers for probate a Last Will and Testament of **Blue**, a writing purported to have been handwritten by, and signed by, **Blue** on **Caregiver's** personal stationery. It stated as follows:

"At my death, Caregiver gets everything, my children get nothing." Signed Blue, July 2, 2006.

Blue had no surviving wife, but had two adult surviving children, **Red** and **Green**, and two grandchildren of a child, **Yellow**, who died in 2004. The grandchildren are both adults, **Indigo** and **Violet**.

Blue professed during his lifetime his love for his children and grandchildren.

Do-right contests the validity of the will submitted by **Caregiver** as either a forgery or having been obtained by undue influence.

1. What is required for a holographic will to be established as valid?
2. What evidence is relevant to prove undue influence? Explain.
3. If the Court finds the Will is forged or obtained by undue influence, who inherits?
4. Of those who inherit in response to question 3, what portions of the \$1,000,000 does each receive?
5. Define per capita share; Define per stirpes share.

WILLS, ESTATES AND TRUSTS – BEST ANSWER

FEBRUARY 2007

1. Holographic Will Requirements in Arkansas: A holographic will must be in the handwriting of the testator and signed according to Arkansas law. Unlike typewritten wills, Arkansas law requires that three disinterested witnesses testify that the handwriting is that of the testator. For attested wills, there is no requirement that the attesting witnesses be disinterested. Arkansas law sets a higher standard for holographic wills because the Supreme Court has stated that holographic wills, by their nature, raise more suspicion than their more formal counterpart. Many states in recent years and model codes have done away with the disinterested witness requirement entirely, but Arkansas still requires that three disinterested witnesses testify to verify that a holographic will is in the handwriting of the testator.

2. Evidence Relevant to Prove Undue Influence: Generally, one must prove that there was a person who was in a position from which they could exert an influence on the decedent. Many courts refer to this position as a confidential relationship. Blue's caregiver clearly would qualify as such a person. One must also show that the testator was susceptible to this person's influence, which one can prove in this case because it is clear that he was 80 years old and suffering from dementia. It is very relevant that the will offered for probate purports to disinherit the testator's own children, which is not a common disposition. The fact that the testator purportedly wanted to disinherit the children he loves raises serious questions as to the validity of the will offered for probate. The main issue is whether the influencer, here caregiver, substituted her will for that of the decedent. Undue influence occurs when one person exercises control over another to the extent that the intent set forth in the will is not that of the testator; instead the will serves the purposes of the person exerting the undue influence. The facts support such a claim because of the nature of the relationship between the two, the fact that the disposition of the property is not typical, and it is very noteworthy that the decedent purportedly wrote the will on caregiver's stationery.
As a general note, one should be aware that when a person such as an attorney is accused of exerting undue influence, the attorney must prove beyond a reasonable doubt that the will was the product of the testator's own free will or the attorney cannot take. The law imposes this higher standard in such a situation because of the unique position of power the attorney has in dealing with the client.

3. If the court finds that the will was forged or obtained by undue influence, then the Property passes by intestate succession. Arkansas law provides that Red and Green would take per capita, meaning they would each receive a 1/3 interest. Red and Green would respectively inherit \$333,333.33. Yellow, who died in 2004, does not take because he is dead. Yet, the 1/3 interest he would have received is divided per stirpes between his descendants, Indigo and Violet. They would respectively inherit 1/6 of the \$1,000,000.00. If the Court does not have a will to probate, then the Court must distribute the estate by intestate succession.

4. Proportion of the \$1,000,000.00 each receives: Red receives 1/3 of the \$1,000,000.00. Green receives 1/3 of the \$1,000,000.00. Indigo and Violet respectively take 1/6 of the \$1,000,000.00.

5. Per Capita and Per Stirpes: Per Capita is a method of intestate distribution. A per capita distribution divides property equally among all persons in a class. In the problem addressed in the above question, the $\frac{1}{3}$ interest that went to Red, Green, and Yellow at the beginning of the distribution was a per capita distribution.

Per Stirpes is also a method of intestate distribution. A per stirpes distribution divides property among descendants that does not guarantee that each member of a class that has the same relationship to the decedent receives an equal amount. For example, Indigo and Violet took the share of Yellow per stirpes. One can easily understand a per stirpes distribution by imagining that Red had predeceased the intestate and left one child who for the purposes of this example we will call White. A per stirpes distribution would give White the $\frac{1}{3}$ share of Red, but Indigo and Violet would still take $\frac{1}{6}$ respectively even though they are equally related to the intestate as White.